

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000217-001 DT

07/24/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

RANDALL JAY NEWNUM (001)

JOHN N VINGELLI

REMAND DESK-LCA-CCC  
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number M-0751-TR-2013-033500.**

Defendant-Appellant Randall Jay Newnum (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the trial court erred in not precluding the State's expert witness from doing a retrograde analysis while testifying. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On December 12, 2013, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and no license plate lamp, A.R.S. § 28-925(C). Defendant was stopped at 12:23 a.m., and his blood was drawn at 2:34 a.m. (R.T. of Dec. 3, 2014, at 29-32, 34, 41-43.) Prior to trial, Defendant's attorney interviewed the State's expert witness, Mr. Richard Bond. (*Id.* at 4.)

On the morning of trial, Defendant's attorney made an oral motion to preclude Mr. Bond from doing a retrograde analysis while testifying:

THE COURT: All right. Let's see. Do we have any preliminary issues that we need to address?

MS. THOMSEN: I don't have any, Your Honor.

MR. VINGELLI: Yes, Your Honor, there is one. I was apprised this morning that the State intends to do a retrograde evaluation. This was not disclosed before today. I did do an interview with the criminalist, who's Richard Bond, who I understand is now with the City of Phoenix. I asked him specifically if he had done one, he said no, and he couldn't do one because his notes are still here. We requested all the information on the case in our Disclosure Statement, which was done by a prior attorney before us involved in the case [*sic*]. At this point, our position is that that's prejudicial, and at this point, a retrograde analysis should not be done when I find out about it the morning of trial.

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THE COURT: Okay. Counsel.

MS. THOMSEN: Your Honor, as defense counsel said, he did have an opportunity to interview Mr. Bond. Mr. Bond typically does the retrograde analysis. As he testified, it's how he forms his opinion. Clearly, the State has to show a BAC of .08 or greater within 2 hours. This case is only 11 minutes out. It will be a quick, easy task for Mr. Bond to bring it back within 2 hours. It's not something that should be precluded. As defense counsel just stated, he knew that the only reason Mr. Bond could not do a retro for him during the interview was because he didn't have his paperwork. So this is not a shock to him. He knows the State has to prove a BAC within 2 hours. It will be the basis for Mr. Bond's opinion, and that's why he is here. If defense counsel wants to challenge any portion of the retrograde analysis, the methodology, the reliability, he can do that in his cross-examination.

MR. VINGELLI: And, certainly, we intend to do that, Your Honor. But the point being, in talking to the prosecutor just this morning when she says I'm going to have Mr. Bond go through a retrograde, she said, well, that's assumed that that happens when there's over 2 hours. That's not the standard, Your Honor. The standard is that the state needs to disclose expert opinions to me. I have a one-page disclosure that says basically any officer named in the police report could be called, and any criminalist could be called. That certainly doesn't meet the burden of telling me about expert opinions, so—

THE COURT: Right. But, you certainly were disclosed the lab reports in the case.

MR. VINGELLI: Absolutely, Your Honor.

THE COURT: And you certainly were disclosed the police reports, which would tell you that the blood draw happened 11 minutes outside of 2 hours?

MR. VINGELLI: That's correct, Your Honor.

THE COURT: And you had the ability to interview Mr. Bond.

MR. VINGELLI: I did, and I asked him about that and he did not—

THE COURT: And you had the ability to even pose to him questions with regard to the blood draw being outside 11 minutes.

MR. VINGELLI: And I did.

THE COURT: Okay. You know, I don't think there's anything that's kind of been sprung on you this morning. You know the State has to prove, in order to get this to the jury, they have to provide evidence that within 2 hours of driving, the defendant's BAC was over a .08. That's the basis of the case. And so it seems to me that you knew that they would have to elicit that testimony from Mr. Bond.

MR. VINGELLI: Not necessarily, Your Honor.

THE COURT: I mean, unless they told you they were going to dismiss the A2.

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MR. VINGELLI: That's exactly what I'm getting at, is nobody said anything about dismissing the A2, but we have an A1 claim here, too, which is just impaired to any degree. So it's not a reasonable assumption for me to draw that there's going to be expert opinion offered on retrograde when I'm—I asked the criminalist about it, he says, no, I don't have my notes, I can't do it, I'm at a different crime lab now.

THE COURT: Well, I mean, why didn't—

MR. VINGELLI: We'd request that—

THE COURT: —you provide him with the information that he would need based on what you have?

MR. VINGELLI: Your Honor, it sounds to me, in talking to him, there was—he said he has lab notes. I have not seen lab notes, although everything regarding the blood evaluation was requested. That did not come to me.

THE COURT: Okay.

MR. VINGELLI: So, again, it's not my job to prove the State's case. So there isn't any one case that the State feels they can go forward on. But as per a retrograde that's talked about in a discussion the day before trial, that doesn't meet the disclosure rules of expert opinions.

THE COURT: Right. Okay. Well, nothing about their retrograde is a surprise to you. You even asked the question back when you did the interview. I'm not going to preclude it. However, if you want a moment or two to meet with Mr. Bond prior to him testifying, we can arrange for that to happen. But you—you'll have to ask him the questions and get—and provide him with the information, in order to get him to answer—give you information that you need. I mean, he doesn't have the facts with regards to what happened in the case. All he knows about is the blood result that he came to. So you're going to have to give him specific facts in order to conduct the interview with regard to retrograde. He never would have had the police report, or anything like that, which would give him the ability to do a retrograde for you. That's something that he has to be provided either through questioning, or like counsel said, when he's on the witness stand, so you would have to—

MR. VINGELLI: Well—

THE COURT: —ask him specific questions regarding the retrograde.

MR. VINGELLI: Your Honor, I don't—I don't—respectfully, I disagree. I don't think it's my job to, again, prove the State's case—

THE COURT: No, it's not.

MR. VINGELLI: —and tell him what he needs—

THE COURT: But it's your job, if you want to prepare for what the State is going to elicit.

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MR. VINGELLI: Absolutely.

THE COURT: I mean, so it's not preparing the State's case, but it's preparing yourself for the testimony that the State is going to bring out in front of the jury.

MR. VINGELLI: I understand. And, just for the record, I asked him if he can do it, he says, no, I don't have my notes. I don't have the notes to provide him, so—

THE COURT: No, but you know what time the stop was.

MR. VINGELLI: Absolutely.

THE COURT: You know what time the draw was.

MR. VINGELLI: Absolutely.

THE COURT: You know that it happened 11 minutes outside the 2 hours. I mean, you could have asked him all of the—what can you do if I provide you these facts? What can—what number can you give me? What do you need—I mean, those are all questions that would have been fair game in the interim.

MR. VINGELLI: And I did ask him, and he says he couldn't perform a retrograde, he'd need more information. Again, it's defense position that this is information that could have been provided to him before my interview. We were waiting for that interview for 6 months.

THE COURT: What information?

MR. VINGELLI: If he says he has information in his notes that he can do a retrograde, and that's what he told me, and then—and then he doesn't have it. So, basically, to make my record, we don't have the burden of proof. I understand what you're saying, we had the fair opportunity to investigate the case—

THE COURT: Sure.

MR. VINGELLI: —and we did do that. The other issue is, if I knew retrograde information—testimony was going to be—

THE COURT: But didn't you have to presume that they were going to do a retrograde—

MR. VINGELLI: Your Honor, again, that's not—

THE COURT: —I mean a blood draw outside of 2 hours?

MR. VINGELLI: The standard is the State disclose this to us. I mean, it's not my job to presume anything. I have the information from the State. We have two counts. We have police reports. And, no, we don't—no, it's not my job to presume, Your Honor. I mean, it's my job to prepare, but I certainly can't presume what the opinions are going to be, especially when I asked him and he said he can't give them to me. If I did know there was a retrograde being done, I would have hired an expert, Your Honor—

THE COURT: Well—

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MR. VINGELLI: —and, of course, we didn't do that.

THE COURT: —I don't know that the State has to specifically call you up or say to you we're going to do a retrograde. I think the State has to disclose to you the names of the people who would testify, the basis for their opinion, which they have, the lab report, and any police reports, documents, photographs, anything like that. I don't think that counsel's failure to tell you 20 days prior to trial we're going to do a retrograde is required by the Rule. So, I won't preclude it. Like I said, if you need time to have a short chat with Mr. Bond prior to his testimony, we can arrange for that.

MR. VINGELLI: Fair enough, Your Honor. Thank you.

(R.T. of Dec. 3, 2014, at 4–11.) The trial court denied Defendant's motion to preclude. (*Id.* at 11.)

At trial, Mr. Bond testified the result of testing Defendant's blood sample showed a BAC of 0.1161 and a BAC of 0.1169. (R.T. of Dec. 3, 2014, at 152.) Mr. Bond acknowledged the blood draw was done 2 hours and 11 minutes after Defendant was driving. (*Id.* at 157.) He testified that, by doing a retrograde analysis back 12 minutes, Defendant's BAC could have been as low as 0.110 and as high as 0.122. (*Id.* at 158–63.)

At the conclusion of the testimony, arguments, and instructions, the jurors found Defendant guilty of both DUI charges. (R.T. of Dec. 4, 2014, at 296.) The trial court later imposed sentence. (R.T. of Jan. 13, 2015, at 302–04.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ERR IN NOT PRECLUDING THE STATE'S EXPERT WITNESS FROM DOING A RETROGRADE ANALYSIS.

A. *Was there a discovery violation.*

Defendant contends the trial court erred in not precluding the State's expert witness from doing a retrograde analysis while testifying. Defendant further contends the appellate court reviews *de novo* whether there was a discovery violation. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶ 62 (2004). Based on this Court's review of the record, for two reasons, this Court finds no discovery violation.

First, there was no general discovery violation. The Arizona Supreme Court has held that a "Defendant is entitled to notice of the crimes with which he may be convicted, not the manner in which the state will prove his guilt." *State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994). The State charged Defendant with violating A.R.S. § 28–1381(A)(2), which gave him notice the State was charging him with driving with a BAC of 0.080 or more. The State was not required to advise Defendant how it intended to prove his BAC was over 0.080.

Second, there was no Rule 15 violation. That rule provides in part as follows:

**b. Supplemental Disclosure; Scope.** Except as provided by Rule 39(b), the prosecutor shall make available to the defendant the following material and information within the prosecutor's possession or control:

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(4) The names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments or comparisons that have been completed, . . . .

(Rule 15.1(b)(4), ARIZ. R. CRIM. P. In the present matter, the State disclosed the name of its expert witness, Mr. Richard Bond, and Defendant's attorney interviewed him. Defendant's attorney and Mr. Bond discussed a retrograde analysis, and Mr. Bond discussed having notes, but it appears Mr. Bond had not yet done a retrograde analysis. Thus there were no "results of . . . scientific tests . . . that ha[d] been completed," so there were no test results the State (or Mr. Bond) was required to disclose.

B. *Assuming there was a discovery violation, did the trial court abuse its discretion in its proposed sanction.*

Defendant contends the trial court abused its discretion in its proposed sanction. In *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006), the State had disclosed its expert witness and disclosed some, but not all, of the expert's conclusions. *Roque* at ¶ 48. The trial court proposed taking a break and allowing the defendant's attorney to interview the expert witness, but the attorney declined to do so. *Roque* at ¶ 49. The court held "the short continuance offered by the trial judge was an appropriate initial approach to resolving the issue." *Roque* at ¶ 50. This is exactly what the trial court proposed in the present case. The trial court therefore did not abuse its discretion in its proposed resolution.

III. CONCLUSION.

Based on the foregoing, this Court concludes there was no discovery violation, and to the extent there could be deemed to have been a discovery violation, the trial court did not abuse its discretion in its proposed resolution.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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